APR 9 2001

No. 00-507

Supreme Court, U.S.
FILED
APR 9 2001
CLERK

IN THE

Supreme Court of the United States

THE CHICKASAW NATION AND
THE CHOCTAW NATION OF OKLAHOMA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* SEMINOLE TRIBE OF FLORIDA, LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA, AND SAINT REGIS MOHAWK TRIBE IN SUPPORT OF THE PETITIONERS

HANS WALKER, JR.
Counsel of Record
JUDITH A. SHAPIRO
JOSEPH H. WEBSTER
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, N.W., Suite 700
Washington, D.C. 20037
(202) 822-8282
Counsel for Amici Curiae

15 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
INTRODUCTION	3
1. Section 20 of the Indian Gaming Regulatory Act Extends to Tribes the Same Exemption to Excise Taxes on Wagering Enjoyed by States	3
2. The Excise Tax Provisions Are Not Applicable to Tribes	9
3. Tribal Tax Exemption is Accomplished by Existing Statutory Language	11
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:	Page
Bryan v. Itasca County, 426 U.S. 373 (1976)	8
Chickasaw Nation v. United States, 208 F.3d 871 (10th Cir. 2000)	4, 11
Crooks v. Harrelson, 282 U.S. 55 (1930)	10
Gould v. Gould, 245 U.S. 151 (1917)	10
Little Six, Inc. v. United States, 210 F.3d 1361, *reh'g denied*, 229 F.3d 1383 (Fed. Cir. 2000)	3, 7
Reiter v. Sonotone Corp., 442 U.S. 330 (1979)	6, 8
United States v. Hallmark, 911 F.2d 399 (10th Cir. 1990)	9
United States v. Merriam, 263 U.S. 179 (1923)	10
Van Wersch v. Department of Health and Human Services, 197 F.3d 1144 (Fed. Cir. 1999)	6, 7
Statutes:	
Indian Gaming Regulatory Act, 25 U.S.C. § 2701-2721; 18 U.S.C. §§ 1166-1168 (1988)	*passim*
25 U.S.C. § 2719(d)(1)	*passim*
Internal Revenue Code (26 U.S.C.):	
Chapter 35	*passim*
26 U.S.C. § 4401	*passim*
26 U.S.C. § 4411	*passim*
26 U.S.C. § 4402(3)	5
[Indian Tribal Governmental Tax Status Act (1982)] 26 U.S.C. § 7871	8, 11

INTEREST OF *AMICI CURIAE*

The Seminole Tribe of Florida is a federally recognized Indian tribe with nearly 3,000 members and five reservations located in the State of Florida.[1] The Tribe owns and operates five gaming facilities in Florida, located on its reservation lands in Hollywood, Brighton, Coconut Creek, Tampa and Immokalee. The Seminole Tribe sells paper pull-tabs at its gaming facilities and has paid the federal wagering excise and occupational taxes purportedly imposed by chapter 35 of the Internal Revenue Code for many years.

The Lac Courte Oreilles Band of Lake Superior Chippewa ("Lac Courte Oreilles Tribe") is a federally recognized tribe located in Northwest Wisconsin with approximately 5,700 members. The Lac Courte Oreilles Tribe operates a casino where paper pull-tabs are sold and pays the federal wagering taxes purportedly imposed by chapter 35 of the Internal Revenue Code.

The Saint Regis Mohawk Tribe is a federally recognized tribe located in the northern part of the State of New York with approximately 9,500 members. The Saint Regis Mohawk Tribe owns the Akwesasne Mohawk Casino and sells paper pull-tabs as part of its gaming activities. The Saint Regis Mohawk Tribe also pays the federal wagering taxes purportedly imposed by chapter 35 of the Internal Revenue Code.

The Court's decision in the instant case will determine whether the Seminole Tribe, the Lac Courte Oreilles Tribe and the Saint Regis Mohawk Tribe are required to pay the

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amici curiae* and their members, made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief and letters of consent have been filed with the Office of the Clerk of this Court.

federal wagering taxes imposed by chapter 35 of the Internal Revenue Code, as well as whether they are entitled to refunds for amounts previously paid. Thus, all three tribes have a direct financial interest in the outcome of this case.

The Tribes disagree with the decision reached below by the Tenth Circuit Court of Appeals and believe that 25 U.S.C. § 2719 exempts tribes from the wagering taxes at issue. However, the textual analysis of 25 U.S.C. § 2719 that supports this position was not fully developed in the proceedings below. Thus, the Tribes respectfully submit this brief *amici curiae* to ensure that a full analysis of the statutory provision at issue is presented to this Court.

SUMMARY OF ARGUMENT

Indian tribes are not subject to federal excise tax on the sale of pull-tabs in their wagering operations. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168 (1988)("IGRA"), that authorized tribes to sell pull-tabs, simultaneously provided that tribes conducting such activities should be treated as states—that is, they must withhold taxes from winners and are exempt from federal excise taxation on their wagering operations.

The grammatical structure of the statutory provisions requires a statutory reading that tribes are exempt from the taxes in question. Further, the taxes do not, by the terms of the taxing statute, apply to federally authorized wagering operations. The IGRA does not impose any new tax. It must follow that tribal wagering operations are outside the scope of the subject federal excise taxation.

ARGUMENT

Introduction

The Indian Gaming Regulatory Act, 25 U.S.C. § 2701-2721; 18 U.S.C. §§ 1166-1168 (1988)("IGRA"), includes a provision to exempt Indian tribes, like states, from the federal excise taxes on wagering imposed by 26 U.S.C. §§ 4401 and 4411. The relevant provision (25 U.S.C. § 2719(d)(1)), states that Indian tribes are to be treated in the "same manner" as states for purposes of chapter 35 (which contains sections 4401 and 4411). Since states are expressly exempt from these taxes, Congress intended that Indian tribes enjoy a similar exemption.

Nevertheless, in the case below (and in direct conflict with a subsequent decision by the Court of Appeals for the Federal Circuit[2]), the Tenth Circuit Court of Appeals held that Congress intended that Indian tribes be treated as states only for purposes of "reporting and withholding of taxes" and not for purposes of the general exemption from the taxes imposed by chapter 35. As detailed below, the Tenth Circuit's construction of 25 U.S.C. § 2719(d)(1) violates the rules of statutory construction and the precedent of this Court. Finally, sections 4401 and 4411 are simply not otherwise applicable to Indian tribal gaming operations.

1. Section 20 of the Indian Gaming Regulatory Act Extends to Tribes the Same Exemption to Excise Taxes on Wagering Enjoyed by States.

Whether Congress intended Indian tribes to be subject to certain taxes (section 4401[3] and section 4411[4] of the Internal

---

[2] *Little Six, Inc. v. United States*, 210 F.3d 1361, *reh'g denied*, 229 F.3d 1383 (Fed. Cir. 2000).

[3] Section 4401 imposes an excise tax of .25 percent on state-authorized wagers and 2.0 percent on wagers not authorized by state law.

[4] Section 4411 imposes an occupation tax of $50 per year on authorized persons who sell pull-tabs and $500 per year on unauthorized persons selling pull-tabs.

Revenue Code) on pull-tab[5] wagering operations turns on a parsing of a sentence in the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168 (1988)("IGRA"). Specifically relevant is 25 U.S.C. § 2719(d)(1):

> The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, *in the same manner as such provisions apply to State gaming and wagering operations.*

(Emphasis added.)

This provision expressly exempts Indian tribes from the excise taxes at issue. First, the designation of "chapter 35" in this subsection is not an isolated "parenthetical reference" without further effect, except to incorporate the definitions of the terms "wager" and "lottery," as posited by the Court of Appeals in *Chickasaw Nation v. United States*, 208 F.3d 871, 883 (10th Cir. 2000), and advocated by the Government (Resp't Br. on *Cert.*, p. 6). To the contrary, each of the parenthetically enumerated tax code provisions, including chapter 35, is reflected in a parallel counterpart in the portion of the sentence that follows. "[S]ections 1441, 3402(q), 6041, and 6050I" each contain provisions relating to reporting and withholding of taxes.[6] Chapter 35 relates to wagering and

---

[5] The Government states that "[t]he term 'wager' includes any lottery that involves pull-tabs." Resp't Br. on *Cert.*, p. 2.

[6] With the exception of section 3406(q), all of the listed provisions have general applicability and gaming is only part of the covered subject. Section 1441 provides for withholding of tax on nonresident aliens; section 3406(q) provides for "Extension of withholding to certain

imposes two separate taxes. States are exempted.[7] 26 U.S.C. § 4402(3). As further explained below, the enumerated Internal Revenue Code provisions form two groups that are treated separately in the remaining portion of section 2719(d)(1).

In fact, the structure of the provision demonstrates that all of the listed Internal Revenue Code provisions are *not* treated with a single purpose. First, by twice using the conjunctive "and," the parenthetical phrase listing the Code provisions demarcates two components: "1441, 3402(q), 6041, *and* 6050I, [component A[8]] *and* chapter 35 [component B]."[9] 25 U.S.C. § 2719(d)(1)(emphasis added). If the purpose were to treat *all* of the listed provisions with a single purpose (that single purpose being, as the Government contends, that they are all referents for the phrase "concerning the reporting and withholding of taxes"), the first "and" would be superfluous.

Second, reinforcing the separate treatment of the two components is the wording of the phrase "concerning the reporting and withholding of taxes with respect to the winnings from gaming *or* wagering operations. . . ."[10]

---

gambling winnings;" section 6041 covers "Information at source" and requires "a true and accurate return" covering payments of $600 or more; and section 6050I requires a return covering the receipt of $10,000 or more in a transaction.

[7] Chapter 35 concerns "Taxes on wagering." It imposes an excise tax on wagers and an "occupational tax" on receiving wagers.

[8] These provisions could have been made applicable to tribal operations without reference to the state.

[9] The exemptive treatment of the state under this provision obviously was the attribute of chapter 35 which Congress sought to extend to tribes.

[10] The Government's misquotation of the reference to chapter 35 as applicable to "gaming *and* wagering operations" is material to this analysis. (Resp't Br. on *Cert.*, p. 6 (emphasis added)). The correct language referring to chapter 35 is "gaming *or* wagering operations." 25 U.S.C. § 2719(d)(1) (emphasis added). The phrase "gaming *and*

25 U.S.C. § 2719(d)(1) (emphasis added). The term "winnings" applies to the winnings from gaming by patrons of the gaming enterprise. Tribes, as enterprise operators, are not the "winners" in the sense in which that term is used in the Internal Revenue Code; any winners are the patrons of the enterprises. The term "wagering *operations*" applies to the operator of the gambling enterprise—here, the tribe, not the patrons.

When the legislative sentence contains two separate units separated by the word "or," that word "or" is disjunctive.[11] The Government's assertion to the contrary is not supported by precedent.

This Court has held that the word "or" is disjunctive. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979), held that "or" was disjunctive as used in the relevant provision of the Clayton Act that allowed individuals to bring suit for injuries sustained in their "business *or* property." (Emphasis added.) A contrary interpretation "would have us ignore the disjunctive 'or' and rob the term 'property' of its independent and ordinary significance . . . ." *Id.* at 338-39.

The Court of Appeals for the Federal Circuit recently addressed the usage of the word "or" in *Van Wersch v. Department of Health and Human Services*, 197 F. 3d 1144 (Fed. Cir. 1999). The court in that case said:

wagering operations" appears later in the subsection referring to state activities.

[11] The disjunctive intent of "gaming or wagering" is further strengthened by the presence of "gaming *and* wagering" later in the same subsection. The reference to the states includes "gaming and wagering" together, extending equal treatment to tribes for both activities. The earlier phrase is intended to be treated differently, in that it refers to the two disparate functions: withholding from gaming [winnings] as distinct from taxation on wagering [operations].

> The plain meaning of "or" is disjunctive. See Webster's Third International Dictionary 1585 (1986) (stating that "or" is a "function to indicate . . . an alternative between different or unlike things, states, or actions").

Id. at 1148.

> To adopt the reading that the government urges would require us to ignore the meaning of the word "or" that the dictionary, common sense, and the experience of life all bring to us. There simply is no way around the fact, in the English language, the word "or" unambiguously signifies alternatives.

Id. at 1151.

The rule therefore mandates that the word "or" in section 2719(d)(1) be construed as a disjunctive in this manner:

> The provisions of the Internal Revenue Code . . . concerning
>
> [A] the reporting and withholding of taxes with respect to winnings from gaming [referring to the withholding and reporting provisions]
>
> *or*
>
> [B] wagering operations [referring to treatment of states in chapter 35] shall apply to Indian gaming operations . . . in the same manner as such provisions apply to state gaming and wagering operations.

(Emphasis added.) Only then can Congress' stated objective of the subsection—to treat tribes as states—be achieved.

In contrast, were the sentence read as the Government suggests, meaning would not be given to all of the words employed and, equally significant, the stated objective of the Congress would be ignored.[12] This Court has stated: "In

[12] Indeed, the Government in its brief (Resp't Br. on *Cert.*, p. 7.), quotes, with approval, the words of a dissenting judge in *Little Six, Inc. v. United States*, 229 F. 3d 1383, 1385 (Fed. Cir. 2000): "It is far easier to

construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter*, 442 U.S. at 339 (internal citations omitted). Failing to construe "or" as disjunctive would be inconsistent with that obligation.

Pursuant to 26 U.S.C. § 7871, enacted as part of the Indian Tribal Governmental Tax Status Act (1982), tribes are treated as states, exempting them from federal taxation. Extending that exemption in IGRA to include gaming activities authorized by IGRA merely maintains the *status quo* with respect to taxing tribes. Congress may not, as the Government contends, tax its wards by implication. Congress must make that change only through express language. In *Bryan v. Itasca County*, 426 U.S. 373, 381 (1976), this Court found significance in the

> total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations. Neither the Committee Reports nor the floor discussion in either House mentions such authority. This omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as *some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress.*

(Emphasis added.) Although this case involves federal, rather than state taxation, the same rule applies—Congress may not impose this tax by inference.

If Congress, contrary to policy and history of treatment of tribes with respect to federal taxes, intended to make a drastic change and tax tribes, it could have so stated.

---

make sense out of the statute if the inconsistent specific examples are read out of the statute because they conflict with the limitation."

2. The Excise Tax Provisions Are Not Applicable to Tribes.

Sections 4401 and 4411 do not impose taxes on Indian tribal gaming operations. The government is incorrect in its assertion to the contrary.

Liability under section 4411 is expressly tied to liability under section 4401.[13] Section 4401, with respect to authorized wagers, provides: "There shall be imposed on any wager *authorized under the law of the State in which accepted* an excise tax equal to 0.25 percent of the amount of such wager." 26 U.S.C. § 4401(a)(1) (emphasis added). However, tribal gaming operations are authorized by IGRA, and not under the law of the state in which accepted. Thus, section 4401(a)(1) is not applicable.

The tax imposed by section 4401(a)(2) is directed at unlawful wagers and impose taxes which are significantly higher than taxes on authorized wagers. *See United States v. Hallmark*, 911 F. 2d 399, 401 (10th Cir. 1990)("the tax rates [in section 4401] may reflect Congress' judgment relative to the different economic realities of legal and illegal wagering activities."). By authorizing tribes to conduct lawful wagering

---

[13] Section 4411 provides:

> (a) In general. There shall be imposed a special tax of $500 per year to be paid *by each person who is liable for the tax imposed under section 4401* or who is engaged in receiving wagers for on behalf of any person so liable.
>
> (b) Authorized persons
>
> Subsection (a) shall be applied by substituting "$50" for "$500" in the case of—
>
> > (1) any person whose liability for tax under section 4401 is determined only under paragraph (1) of section 4401(a), and
> >
> > (2) any person who is engaged in receiving wagers only for or on behalf of persons described in paragraph (1).

26 U.S.C. § 4411 (emphasis added).

enterprises under federal law, Congress did not, in the same law, subject them to punitive excise taxes on unauthorized wagers under state law as though they were lawbreakers—as if they were illegally conducting wagering unauthorized under state law. Thus, section 4401(a)(2) (and consequently section 4411) is not applicable to Indian gaming.

This interpretation is consistent with the canon that laws imposing taxes are to be strictly construed. In *United States v. Merriam*, 263 U.S. 179, 187-188 (1923), this Court stated:

> in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government in favor of the taxpayer.

(Internal citation omitted.) *See also Crooks v. Harrelson*, 282 U.S. 55, 61 (1930) ("the general rule requiring adherence to the letter applies with peculiar strictness [to taxing acts]."). Accordingly, sections 4401 and 4411, by their own terms, have no application to tribes.

The imposition of a tax is limited to the express provisions of the statute:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out.

Gould v. Gould, 245 U.S. 151, 153 (1917). The express provisions of sections 4401 and 4411 are not applicable to federally authorized tribal gaming activities.

If Congress had intended the tax-imposing provisions of section 4401 and section 4411 to apply to tribes, it could easily have amended the statute to provide that the taxes imposed by those provisions shall apply to any wager

"authorized under the Indian Gaming Regulatory Act." It did not do so.[14]

3. Tribal Tax Exemption is Accomplished by Existing Statutory Language.

The Tenth Circuit Court of Appeals (*Chickasaw, supra,* at 882-883) and the Government, (Resp't Br. on *Cert.*, p. 8), argue that any exemption was deleted from the bill prior to passage.[15] The Tenth Circuit Court held that the deletion of an express exemption barred a "negative inference" that would support an implied exemption. Likewise, the Government argues in its brief that "The deletion of the express exemption in the original proposal is strong evidence of Congress's intent not to provide such an exemption." *Id.*

However, this is not a case of simple deletion of a provision in a proposed bill by Congress. Rather, Congress *replaced* the deleted language with an express reference to chapter 35 in the list of applicable sections of the Code. As explained above, pages 3 to 8, that inclusion in the statute extends the state exemption to tribes. Thus, the deletion had no substantive effect since it was replaced with equally effective language.

Finally, a word about whether the construction we urge here would result, as the Government has contended, in an exemption by implication. States are expressly exempt from taxation in chapter 35. IGRA provides that that tribes are to

---

[14] Tribes have been exempted from certain federal excise taxes by according them the same standing as states through the Indian Tribal Governmental Tax Status Act. *See* 26 U.S.C. § 7871. It was not necessary for Congress to amend the Indian Tribal Governmental Tax Status Act (as suggested in *Chickasaw, supra*, at 882, and the Government in its brief (Resp't Br. on *Cert.*, pp. 9-10)), since it accomplished the same result through the enactment of 25 U.S.C. § 2719(d)(1).

[15] Congress deleted the word "taxation" while at the same time adding an express reference to "chapter 35."

be treated as states for purposes of that chapter. Giving tribes the same standing is not an implication, but the express will of Congress.

CONCLUSION

For reasons stated above the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

HANS WALKER, JR.
Counsel of Record
JUDITH A. SHAPIRO
JOSEPH H. WEBSTER
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, N.W., Suite 700
Washington, D.C. 20037
(202) 822-8282
Counsel for Amici Curiae

Dated: April 9, 2001